[251] F.M.S. REPORTS

G. BENJAMIN v. Y. M. ESMAILJEE

[O.C.J. (Cussen J.) December 5, 1935]
[Negri Sembilan Civil Suit No. 7 of 1935]

Common Gaming Houses Enactment, 1912, ss.4, 7 and 9 — Public lottery — Sale of Turf Club lottery tickets to the public by a member — Suit by one of the public against the member for proceeds of a winning ticket.

The defendant was a member of the Penang Turf Club and as such bought more than two hundred tickets in a lottery held by that club. This lottery was private because the issue of tickets was confined to members of the club.

The defendant kept two tickets for himself and sold the remainder to the plaintiff and other persons, who were not members of the Penang Turf Club.

One of the tickets sold to the plaintiff won a prize. The Penang Turf Club paid over the prize money to the defendant, who paid over a small part thereof to the plaintiff and refused to pay over the balance amounting to $7,671. In consequence the plaintiff sued the defendant for this balance.

Held: that the plaintiff's cause of action was based on an illegal and void contract, namely a separate and distinct public lottery in which both he and the defendant were principals and consequently the plaintiff's claim failed.

Jeff for the plaintiff.

Farr for the defendant.

Cur. Adv. Vult.

Cussen J.: In this suit the defendant raises a question of law which it was decided should be taken as a preliminary issue. He contends that on the claim as set out in the plaint together with certain facts admitted, the plaintiff has no cause of action as the claim arises out of an illegal contract.

The facts are, for the purposes of this argument, as follows:—

The defendant in July, 1934, was a member of the Penang Turf Club.

The Club held a sweep or lottery on the result of one of the races on the 28th July, 1934.

The lottery was a private lottery, the issue of tickets being confined to the members of the club.

The defendant, as a member, bought from the club over two hundred tickets in this lottery. His object in doing so was to sell the tickets to persons who were not members of the Turf Club.

He tells us he kept two tickets for himself and sold the rest to various persons. Among the purchasers of tickets from the defendant was the plaintiff who bought ten of the tickets from him.

The plaintiff is not a member of the Turf Club.

One of the tickets sold to the plaintiff — a ticket issued to and in the name of the defendant as a member of the club — won the second prize in the sweep value $8,236.

The Penang Turf Club has paid this sum to the defendant.

The plaintiff states he has received only $565, and that the defendant refuses to pay him the balance of $7,671.

He now sues to recover this sum.

The question now raised, i.e. whether the plaintiff has a cause of action, is in my opinion determined by the decision of the Court of Appeal in the case of *Kader Batcha* v. *Public Prosecutor,* [1935] F.M.S.L.R. 18; [1935] M.L.J. 251.

By a majority [Thomas C.J. and Huggard C.J. (S.S.] it was held that a person, who acts as did the defendant in this case, is promoting and organising a separate and distinct lottery of his own, making use of the tickets in the private Turf Club lottery for that purpose, and as he sells the tickets in this separate lottery to members of the public it is an illegal public lottery.

The Straits Settlements Court of Appeal, in January, 1935, arrived at the same conclusion on a case in which the facts were exactly similar — *Rex* v. *Latip bin Haidin,* [1935] M.L.J. 84. The decision of the Court was unanimous (Huggard C.J., Prichard and Terrell JJ.).

The position, in law, in this present case, then is that the defendant organised, and promoted, and sold tickets in a public lottery and the plaintiff bought some of the tickets.

A public lottery is an illegal transaction and both the person who promotes and carries on the public lottery and sells the tickets therein, and the person who buys a ticket commit offences punishable under sections 4 and 7 of the Common Gaming Houses Enactment, 1912.

And under section 9 of the Enactment every sale of a lottery ticket is void and no action is maintainable by any person in respect of any such sale or contract except by the purchaser for the return of the money or other consideration paid thereon.

The plaintiff and defendant are parties to an agreement and contract which is illegal and void. The plaintiff is the winner of a prize in the separate lottery carried on by the defendant, his cause of action is based upon the illegal and void contract between him and the defendant in which contract — in the separate and distinct lottery — they were principals.

No question arises here of principal and agent as the lottery in question is the separate, distinct lottery organised by the defendant.

I am of opinion that the defendant must succeed on this question of law. I find that the plaintiff has no cause of action.

The suit is therefore dismissed with costs.

Suit dismissed.

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[252] K. ARUMUGAM v. J. K. R. LEONARD [252]

[A.C.J. (Thomas C.J., Burton Ag. C.J. (S.S.) and Terrell J.) January 9, 1936]
[Negri Sembilan Civil Appeal No. 3 of 1935]

The Land Code, 1926, Schedule XXIV(a) — Charge — Payment of interest after due date — Interest by way of damages.

The appellant executed a charge in the statutory form, Schedule XXIV(a), Land Code, 1926, in favour of the respondent. The material parts of this charge were as follows:—

"Firstly, that I (the chargor) will pay to him the said chargee, the sum of $10,000 on the 28th day of March, 1929.

Secondly, that if any default be made in payment of the interest due upon this charge, the said principal sum

together with the interest due thereon shall immediately become due and payable on demand by the said chargee.

And for the better securing to the said chargee the repayment in the manner aforesaid of the principal sum and interest I hereby charge the lands described with such principal sum and interest, etc."

In a suit claiming the balance of monies secured on the charge after sale of the land charged, the Judge allowed interest at the rate covenanted in the charge up to the date of the plaint and further interest at the same rate up to the date of final disposal of the suit.

Held, on appeal, by Burton Acting C.J. (Straits Settlements) and Terrell J. (Sir Samuel Thomas C.J. dissenting) that on the true construction of the charge the words "and for the better securing to the said chargee the repayment in the manner aforesaid of the principal sum and interest" referred back to the date when the principal sum became due, i.e. the 28th March, 1929. Accordingly, the appellant was not liable to pay interest under the charge after that date.

But the respondent could recover interest after default by way of damages and since payments of interest had actually been made, section 20 of the Limitation Enactment, 1896, applied.

S. Seenivasagam and *M. N. Cumarasami* for the appellant.

R. Ramani for the respondent.

Cur. Adv. Vult.

Thomas C.J.: The first question raised by this appeal is whether a charge drawn in the Form contained in Schedule XXIV(a) of the Land Code, 1926, provides for payment of interest as long as the loan remains unpaid.

The material parts of the charge are as follows:—

"Firstly, that I will pay to him the said chargee the above sum of $10,000 on the 28th of March, 1929.

"Secondly, that I will pay interest on the said sum at the rate of $12 by the hundred dollars in the year by equal payments of $100 on the 28th day of every month the first of such payments to be made on the 28th day of January, 1929."

There is an additional undertaking as follows:—

"Thirdly, that if any default be made in payment of the interest upon this charge, the said principal sum together with the interest due thereon shall immediately become due and payable on demand by the said chargee."

It has been contended that the effect of the charge is to render interest payable for the fixed period of one year only and thereafter not payable as such but only recoverable in a suit for damages. In support of this contention two cases have been relied upon, viz. *Cook* v. *Fowler,* (1874) L.R. 7 H.L. 27, and *In re Roberts,* 14 Ch. D. 49. In the former case Lord Selborne said:—

"Unless it can be laid down as a general rule of law, that upon a contract for the payment of money borrowed for a fixed period, on a day certain, with interest at a certain rate down to that day, a further contract for the continuance of the same rate of interest after that day, until actual payment, is to be implied, the decision of the Vice-Chancellor in this case is not erroneous."

And in each of these cases it seems clear that there was a stipulation to repay the money lent together with an agreed rate of interest on a specified day. In the former case a warrant of attorney was given to enter up judgment for the principal and interest calculated at 5 per centum per month; in the latter case the principal of £5,000 and £250 balance of interest was to be paid on a specified day.

From the nature of these transactions it was clearly intended that the interest should be limited to the date on which the money was to be paid. There was no suggestion that interest was to be continued to be paid as long as the principal remained unpaid, and therein these cases appear to me to differ from the provisions made in Schedule XXIV(a) of the Land Code, 1926, employed in the charge now under consideration. Therein there is no suggestion that on the 28th of March, 1929, three months after the principal had been lent, the interest due to the 28th of March, 1929, should be payable. Instead there is the provision that interest should be payable on the 28th of every month, the first payment being made on the 28th of January.

The further provision seems to emphasise the intention since it provides that if any default is made in payment of the interest upon the charge, the said principal sum together with the interest due shall immediately become due [253] and payable on demand; and although it might be contended that this related to a period anterior to the 28th of March, 1929, it does not say so, and leaves the matter open to the construction that it remains for the chargee to make a demand and until that demand is made the agreement remains open with the interest running at the agreed rate. This is the construction which has always been placed upon this kind of charge. There is, it is true, no reported decision in the Federated Malay States (which do not include Johore), but cases have been constantly coming before the Courts over a number of years, and this is the construction which has invariably been followed and has been fully understood between the parties to the charge. Moreover, cases based upon charges have on several occasions been before the Court of Appeal, and never has the point now raised been advanced by anybody concerned in the appeal. Therefore indirectly the construction has also had the approval of the Court of Appeal. Any alteration in the accepted position of the law would be fraught with the greatest inconvenience to those who have engaged in these transactions. [253]

In the case of *Mathura Das* v. *Raja Narindar Bahadur,* I.L.R. 19 All. 39, the judgment of the Privy Council delivered by Sir R. Couch contained the following:—

"If it be true that covenants not to transfer till principal and interest be paid are sometimes inserted, when the intention is only to secure interest for a single year, such intention must be gathered from other parts of the deed itself. If such a covenant, not being controlled by other parts of the deed, does not mean that interest is to run till payment it is very difficult to say what it does mean. The covenant to pay within a year ties up the hands of the mortgagee for that year and protects the mortgagor; but it rarely happens, and is rarely contemplated, that the mortgagor should actually pay by that time. The provision for applying payments to reduction of interest points strongly to the expectation of the parties that the transaction will not be closed when the fixed day of payment arrived. The construction of the High Court ascribed to the parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest, that the creditor shall have no remedy provided by contract, but shall be driven to treat the contract as broken, and to seek for damages, which lie in the discretion of a jury or a Court, and are subject to

a different law of prescription. It appears to their Lordships that though contracts are not unfrequently found to be of that imperfect nature, it is more reasonable to ascribe to the parties the intention of making a perfect contract, especially when such a contract is of a very common kind, and suitable to the ordinary expectations of persons entering into a mortgage transaction."

And in the case of *Chajmal Das* v. *Brij Bhukan Lai*, I.L.R. 17 All. 511, 517, the judgment of the Privy Council stated:—

"Their Lordships are not prepared to dissent from the construction placed by the High Court on the bond in respect of there being no covenant by Banke Lal to pay interest after the fixed period of two years from the date of the bond although it is difficult to suppose that this was the intention of the parties to the bond."

And the learned trial Judge in the present case has found that—

"The covenant to pay interest in this charge is not limited or restricted in any way, and, in my opinion, the agreement between the parties is to pay interest on the loan at the specified rate as long as the loan remains unpaid."

And later on he says:—

"But in my opinion the covenant in the charge provides for payment of interest as long as the loan remains unpaid and is not affected by the covenant to repay the principal upon a fixed date."

With these findings I agree for the reasons I have already set out.

In view of my opinion on this question it only remains for me to say that I agree with the judgment of Burton J. which I have had the opportunity of reading, when he says—

"Now it is clear on the pleadings that on 8th November, 1933, a payment was made to account of interest by the defendant. Paragraph 11 of the plaint refers to a consent order made on the 26th day of October, 1933, in which the chargor 'pays into Court the sum of $160 to account of the interest due to the chargee under the charge herein . . . .'

The payment was a condition precedent to the defendant obtaining an adjournment and he does not dispute that he obtained it. Mr. Seenivasagam did not appear to dispute these payments, but said that they need not have been paid as interest. But he could not suggest any other reason for their payment."

I agree that the payment having been made it was sufficient to bring into operation section 20 of the Limitation Enactment.

In my opinion, therefore, the appeal must be dismissed with costs. The deposit should be paid out to the respondent or his solicitor on account of his taxed costs.

Burton Ag. C.J.: This is an appeal from a decree of Cussen J. in a suit by the plaintiff for the balance [254] of monies secured on a charge after [254] of the property charged. Cussen J. decreed the sum of $7,121.94 which was the amount claimed in the plaint and included interest at 12 per centum, which was the rate covenanted in the charge, calculated up to the date of the plaint, and he allowed interest at the same rate till the date of the final disposal of the suit on October 4th, 1935.

At the trial it was agreed by counsel that it was not necessary to call any evidence, and two issues of law were argued, which are stated by the learned trial Judge as follows:—

(1) that on the proper construction of the charge, interest is not payable after the due date fixed for the repayment of the loan; and

(2) that the suit is barred by the Limitation Enactment, 1896.

Cussen J. held against the defendant on both these issues. He held that the limitation period was three years under article 62, and that the covenant in the charge provided for payment of interest as long as the loan remained outstanding, and was not affected by the covenant to repay the principal on a fixed date. He held that payments of interest were made up to December, 1931, and consequently that by virtue of section 20 of the Limitation Enactment a new period of limitation should be computed from that date. The plaint was filed on 27th December, 1933, so that upon these findings the suit is not time-barred.

The principal line of attack by Mr. Seenivasagam was against the finding on the first issue; he argued that upon the true construction of the document of charge the learned trial Judge should have held that the covenant for payment of interest ceased on 28th March, 1929, the date upon which the principal was covenanted to be repaid.

The document of charge is in the statutory form of Schedule XXIV(a) to the Land Code, and the material covenants are as follows:—

The chargor agrees,

"Firstly, that I will repay to him the said chargee the above sum of $10,000 on the 28th day of March, 1929,

Secondly, that I will pay interest on the said sum at the rate of $12 by the hundred dollars in the year by equal payments of $100 on the 28th day of every month, the first of such payments to be made on the 28th day of January, 1929."

The third stipulation is not relevant to the present question. The point is new although many thousands of charges must have been made in this statutory form.

I propose to deal with the cases relied on by Mr. Seenivasagam, *seriatim*.

The first case which he cites is *Cook* v. *Fowler*, (1874) L.R. 7 H.L. 27, which was an action on a warrant of attorney to enter up judgment forthwith upon default in the payment of principal and interest. The material words of the warrant of attorney are as follows:—

"The within warrant of attorney is given to secure the payment of the sum of £1,330 with interest thereon at and after the rate of £5 per cent. per month, on the 2nd of June next, judgment to be entered forthwith; and in the case of default in payment of the said sum of £1,330 and interest thereon, on the day aforesaid, execution . . . may then issue for the said sum of £1,330 and interest . . . ."

It will be seen that here the rate of interest was exceptionally high and that the warrant definitely covenants that both should be paid at a time certain or judgment entered forthwith; and the fact that the covenant for interest is included in the covenant for the repayment of the principal may serve to distinguish this case from the two separate covenants of our case. This point is brought out clearly in the speech of Lord Selborne who said at p. 37—

"My Lords, unless it can be laid down as a general rule of law, that upon a contract for the payment of money borrowed for a fixed period, on a day certain with interest at a certain rate down to that day, a further contract for the continuance of the same rate of interest after that day, until actual payment, is to be implied the decision of the Vice-Chancellor in this case is not erroneous."

In *In re Roberts,* 14 Ch. D. 49, the borrowers covenanted for repayment of the money advanced "that they . . . . would on 20th July, 1868 pay to Berridge . . . . the sum of £250, being half a year's interest on the £5,000 advanced, and would, on the 20th day of January, 1869 pay to Berridge the sum of £250 being a further half-year's interest, and also the principal sum of £5,000, making together £5,250." The judgments of the Court held that interest was recoverable as damages after the date, but not necessarily at the rate stipulated. But again in this case the words definitely imply an end of the whole contract on the 20th of January, 1869; and the words being dissimilar, this case does not give us much direct assistance. There can be very little doubt, I suppose, that the parties never contemplated a punctual repayment, and that the advance was, like most charges and mortgages, regarded by both parties as an investment, but that again does not help us in the interpretation of the plain words of the documents. In *Chajmal Das* v. *Brij Bhukan Lal,* I.L.R. 17 All. 511, 517, Lord Morris said:—

"Their Lordships are not prepared to dissent from the construction placed by the High Court on the bond in respect of their being no covenant by Banke Lal to pay interest after the fixed period of two years from the date of the bond, [255] although [255] it is difficult to suppose that this was the intention of the parties to the bond."

In this case again the covenant was not very similar to ours;

"I promise that I shall pay the said money with interest at the rate of Rs. 1-4-0 per cent. per mensem, in two years; that interest shall be paid six-monthly; that in case of default in payment of interest on the expiry of any six months it will be treated as principal, etc."

The Allahabad High Court held that on the plain construction of the mortgage there was a covenant to pay the principal and interest at the expiration of two years and no covenant to pay interest *post diem;* and the Privy Council upheld this view.

The charge in our case definitely stipulates for the repayment of the principal on 28th March, 1929, but there is no limitation to the stipulation to pay interest; it is provided for in a separate clause, but the charge goes on, "for the better securing to the said chargee the repayment in manner aforesaid," which seems to me to imply that the parties contemplate enforcing the charge on the date due. I conclude, therefore, though with some hesitation, that on a true construction of this document of charge the words do not clearly import a stipulation to pay interest after the 28th March, 1929.

The defendant, however, is liable to pay interest after that date not as interest on the contract, but as damages for the detention of the debt. In *Price* v. *The Great Western Railway,* 16 M. & W. 244; 153 E.R. 1179, 1181, Parke B. referring to *Dickenson* v. *Harrison,* 4 Price 282; 146 E.R. 465, that the constant and invariable practice is to give interest by way of damages in such cases. And in *Chajmal Das* v. *Brij Bhukan Lal, ubi sup.,* Lord Morris said: "But even on that construction the plaintiff would be entitled, on default being made in the payment, to recover interest technically as damages, and the rate would *prima facie* be the same as that provided by the bond during the two years, although there is no rule making that rate necessarily the measure of the damages. But there is not the slightest reason why the rate of interest should not be the measure of damages in the present case."

Now it is clear on the pleadings that on 8th November, 1933, a payment was made to account of interest by the defendant. Paragraph 11 of the plaint refers to a consent order made on 26th day of October, 1933, in which the chargor "pays into Court the sum of $160 to account of the interest due to the chargee under the charge herein....." The payment was a condition precedent to the defendant obtaining an adjournment, and he does not dispute that he obtained it. Mr. Seenivasagam did not appear to dispute these payments, but said that they need not have been paid as interest. But he could not suggest any other reason for their payment.

The basis of the argument before Cussen J. was that this payment was to account of interest, for otherwise there would have been no need for counsel to argue that the covenant for interest ceased on 28th March, 1929. If there had been no payments and if they had not been paid as interest, the question of limitation would have fallen to be argued only.

But Mr. Seenivasagam now says that as there was no covenant for the payment of interest *post diem,* the money was paid as damages and does, therefore, not avail to bring into operation section 20 of the Limitation Enactment and start a new period of limitation. But I do not think there is anything in this. In *Chajmal Das* v. *Brij Bhukan Lal, ubi sup.,* the Privy Council speaks of recovering interest technically as damages, and in *Price* v. *Great Western Railway, ubi sup.,* Parke B. speaks of giving interest by way of damages. The money paid is interest, and paid as interest, though technically recoverable as damages, and I think, therefore, that the payment is sufficient to bring into operation section 20 of the Limitation Enactment.

It does not therefore fall to be decided whether the decision of Cussen J. that the charge would be barred as a simple bond under Article 48 of the Limitation Enactment was correct. But I find myself fully in agreement with the opinion about to be expressed by Terrell J. that it is not a bond. Beyond this I do not wish to express any opinion on the question of limitation.

I think the appeal should be dismissed with costs.

Terrell J.: In the charge which was the subject matter of these proceedings the chargor's agreement was in the statutory form (Schedule XXIV(a)). Accordingly it provided as follows:—

"Firstly, that I (the chargor) will pay to him the said chargee the sum of $10,000 on the 28th day of March, 1929.

Secondly, that I will pay interest on the said sum at the rate of $12 by the hundred dollars in the year by equal payments of $100 on the 28th day of every month the first of such payments to be made on the 28th day of January, 1929.

Thirdly, that if any default be made in payment of the interest due upon this charge, the said principal sum together with the interest due thereon shall immediately become due and payable on demand by the said chargee,

and for the better securing to the said chargee the repayment in manner aforesaid of the principal sum and interest I thereby charge the lands above described with such principal sum and interest, etc."

[256] [256] The meaning and intention of the charge can only be ascertained by an examination of the words used and little assistance can be obtained from cases which turn on the construction of documents differently worded, and I would refer to the case of *Chajmal Das* v. *Brij Bhukan Lal,* I.L.R. 17 All. 511, 514, where the judgment of the High Court contains the following passage :—

"It appears to us that there is considerable danger attending the applying to one document the judicial construction which has been, in a previous case, applied to another, unless the two documents are in exactly the same terms."

In that case the High Court held that there was no covenant to pay interest *post diem,* and the Privy Council upheld this construction, "although," as they said, "it is difficult to suppose that this was the intention of the parties to the bond."

On the other hand, in another Privy Council case, *Mathura Das* v. *Raja Narindar Bahadur,* I.L.R. 19 All. 39, 47, it was held that the mortgage deed provided for interest *post diem,* but the judgment reads as follows :—

"But it is not necessary to dwell further on this point, because their Lordships think that the Courts below have have misconstrued the deed. Indeed they do not find in the judgments any attempt to arrive at the meaning of the deed by an examination of its terms. Both Courts appear to have followed decisions in other cases, according to which it would seem that in the High Court of Allahabad a fixed rule of construction has been laid down for transactions of this kind, without much regard to what the parties have actually said."

I also agree with the learned trial Judge that the cases of *Cook* v. *Fowler,* (1874) L.R. 7 H.L. 27, and *In re Roberts,* 14 Ch. D. 49, are not really in point as in each of these cases the covenant to pay interest was expressly limited to a certain period. It is necessary therefore to examine the exact provisions of the charge in question.

Now, there is clearly no agreement in express terms to pay interest after the date of default, and the only arguments in favour of implying such an agreement are (a) that the contract to pay interest is in general terms, and (b) that charges in the form used have always been interpreted as containing an implied agreement to continue to pay interest after default, though admittedly the point has never been argued or adjudicated upon.

As regards (a), it is true that the agreement under the heading "secondly" is general in form, but the words introducing the actual charge are "for the better securing the repayment in manner aforesaid of the principal sum and interest." "In manner aforesaid" must I think refer back to the date when the principal is due, i.e. the 28th March, 1929. It is not as if parties were bound by the Enactment to use a certain form from which no departure is permissible; a certain latitude is allowed and any special stipulation may be included under the heading 'thirdly.' In fact counsel handed up a form in use in Johore, where the Enactment is similar, and which specifically provides for payment of further interest after default in the same way that a legal mortgage in England usually provides for payment of interest at the same rate if the principal is not repaid on the date stipulated for repayment.

As regards (b), I am aware that in the past when a charge has been in the statutory form without any special stipulations, the Collector under section 142 has nevertheless calculated "the amount due on the charge" by including interest subsequent to the date of default, and that in the same way the Registrar acting under the powers conferred by section 150(ii) has also calculated the reserve price by including interest at the agreed rate after the date of default, but in my opinion no length of time can give validity to a practice which is not justified by the express terms of the Enactment. As Lord Macnaghten said in *Hamilton* v. *Baker,* 14 App. Cas. 209 :—

"I am sensible of the inconvenience of disturbing a course of practice which has continued unchallenged for such a length of time and which has been sanctioned by such high authority (*The Mary Ann,* 1 A. & E. 8). But if it is really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your Lordships from correcting the error. To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the legislators, merely because it has happened for some reason or another to remain unchallenged for a certain length of time."

In that case it was necessary for the House of Lords to overrule a decision given upon the construction of the Admiralty Court Act of 1861 and which they considered erroneous. The principle laid down by Lord Macnaghten accordingly applies *a fortiori* in a case like the present where it is admitted that the practice relied on is by no means universal, and where there has been no reported decision at all to give sanction to a practice which has only been followed because it has not been challenged. It is an attempt to get the Courts to imply a stipulation which could very well be expressed and which I think a careful lawyer would normally insert.

I conclude therefore that in the absence of such special stipulation the interest, whether under section 142 or under section 150(ii), should [257] only be calculated to the date when default was made in payment of the principal. [257]

This does not, however, conclude the matter as far as the argument on limitation is concerned. Even after default interest is recoverable by way of damages, and as money was actually paid as interest well within the limitation period, I think that the chargee can rely on section 20 of the Limitation Enactment. As regards the authorities on this point, I have had the opportunity of reading the judgment of Burton Acting Chief Justice, Straits Settlements, and agree with his comments and conclusions and have nothing to add.

Although, therefore, I differ from the learned trial Judge in my view that after default interest is only recoverable as damages, I am also of opinion that the payments actually made were payments of interest as much within the meaning of section 20 of the Enactment, and accordingly agree with the learned trial Judge that the plea of limitation fails.

The learned trial Judge, however, expressed the further opinion that if the payments after the 28th March, 1929, the date of default, could not be treated

as payments of interest, then the period of limitation was three years from the 28th March, 1929, and accordingly that the suit was barred, not having been instituted until December 1933. In coming to this conclusion the learned Judge decided that the charge was "a simple bond, when a day is specified for payment" (Art. 48 of the Limitation Enactment). Mr. Ramani for the respondent, however, argued that Article 95, which gives a period of six years "for compensation for a breach of contract in writing," is a special article and not a residuary article and that accordingly where a contract is in writing, Article 95 applies whether or not there is another special article giving a shorter period of limitation. He relied on the principle established by the Privy Council decision of *Tricomdas* v. *Gopinath,* 44 I.A. 65, 70. But as pointed out by the learned trial Judge, the corresponding article under the Indian Act, Article 116, deals with "contracts in writing registered," and there is in the Indian Act no other special article dealing with registered contracts at all. The principle laid down by the Privy Council cannot therefore be applied in the Federated Malay States without modification. It was held by the majority of the Court in the case of the *Kwong Yik (Selangor) Banking Co. Ltd.* v. *Malayan Daily Express (1926) Ltd. and others,* [1933-34] F.M.S.L.R. 51, 57, 64; [1933] M.L.J. 198, that where a contract may or may not be in writing Article 95 should be applied when the contract is in writing, in preference to a special article which would *prima facie* cover such a contract whether in writing or not. But where, as in the case of a bill of exchange or a promissory note, the contract must necessarily be in writing, then I think Article 95 can only be applied if there is no special article dealing with the same subject matter. It is true that Article 95 is not in terms a residuary article, but it is a general article, and in the construction of statutes, if there is a special clause covering the exact point, it will prevail over a general clause which might also cover it — *generalis specialibus non derogant.* I think, however, that it must be shown that the special article indubitably applies, and if such article can only be applied by straining the language, then the special article should be rejected in favour of the general article.

In my opinion the agreement to pay in a charge is not a bond. It is certainly not a bond within the meaning of the definition in section 2 of the Enactment, and although the definition is not inclusive, I think that it indicates that the word 'bond' is used in its ordinary sense of an obligation to pay subject to a condition. As Garth C.J. points out in *Gisborne & Co.* v. *Subal Bowrie,* I.L.R. 8 Cal. 284, 286, a bond is an obligation of a different character from a covenant to do a particular act, the breach of which must be compensated in damages. In the case of a simple money bond the plaintiff recovers the sum named in the bond, whereas in the case of the charge now before the Court the plaintiff is entitled to recover interest by way of damages for default in payment of the principal on the due date. Mr. Ramani has also pointed out that every mortgage deed in India expresses that the mortgagor 'binds himself' and such deeds are always referred to as mortgage bonds, and that accordingly the Indian decisions are not really in point. See *Gour,* Indian Transfer of Property Act, Vol. II, p. 896, paragraph 1429. As, therefore, it cannot be shown that a Federated Malay States charge clearly falls under any of the special articles, Article 95 should be applied and the period being six years, the plea of limitation fails for this reason also.

I would dismiss the appeal with costs. The deposit should be paid out to the respondent or his solicitor on account of his taxed costs.

Appeal dismissed.

PUBLIC TRUSTEE, FEDERATED MALAY STATES v. ANG KEH THO & ANOR.

[O.C.J. (Terrell Ag. C.J.) April 17, 1936]
[Selangor Civil Suit No. 160 of 1934]

Land Code (Cap. 138), s.111 — Liabilities of transferee of charged land.

The plaintiff was the registered chargee of a piece of land and the chargors were the first defendant and *T.* Subsequent to the charge *T.* transferred his beneficial interest in the land to the second defendant. The chargors having defaulted, the land was sold to recover the amount due on the charge and was bought in by the plaintiff. On sale there was a deficit for which the plaintiff, in this suit, sued both defendants. The second defendant pleaded that there was no cause of action against him.

[258] **Held:** that section 111 of the Land Code (Cap. 138) only makes the transferee of charged land liable to the chargee so long as the transferee remains the proprietor of such land, and therefore the second defendant was not liable because after the sale to recover the amount due on the charge he ceased to be the proprietor. [258]

Ramani for the plaintiff.
First defendant in person.
Hastings for the second defendant.

Cur. Adv. Vult.

Terrell Ag. C.J.: The plaintiff was the registered chargee of a piece of land held under Certificate of Title No. 4938, Kuala Lumpur. The chargors were the first defendant and one Tallalla. Subsequent to the charge the latter transferred his beneficial interest in the land to the second defendant. The chargors having made default, the land was put up for sale, and ultimately on the 25th November, 1933 was bought in by the plaintiff for $19,010. There was a deficit of $7,044.25 for which the plaintiff sued the two defendants. The plaint was filed on the 22nd May, 1934. The facts are not in dispute, and judgment has been obtained against the first defendant. The second defendant, however, alleges that the plaint discloses no cause of action against him.

In the case of a legal mortgage, there is no privity of contract between the mortgagee and the transferee of the equity of redemption; the transferee, however, who purchases subject to the mortgage debt is, in equity, apart from the express covenant, under an obligation to indemnify the original mortgagor whose liability under the personal covenant continues, see *per* Fletcher Moulton L.J. in *Mills* v. *United Counties Bank Ltd.,* [1912] 1 Ch. 231, 241, where he says that the obligation is based on good sense, and relates to every case where it can be reasonably implied that it was the intention of the parties that the indemnity